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BELLSOUTH

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June 27, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2005-57-C

Dear Mr. Terreni:

Enclosed for filing are an original and ten copies of BellSouth Telecommunications, Inc.'s Memorandum in Reply to Joint Petitioners' Response to BellSouth's Motion to Strike in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this memorandum as indicated on the attached Certificate of Service.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosures
cc: All Parties of Record
DM5 # 591189

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of	)	
	)	
Joint Petition for Arbitration of	)	
	)	
NewSouth Communications Corp.,	)	
NuVox Communications, Inc.	)	Docket No. 2005-57-C
KMC Telecom V, Inc., KMC Telecom III LLC, and	)	
Xspedius Communications, LLC on Behalf of its	)	
Operating Subsidiaries Xspedius Management Co.	)	
Switched Services, LLC, Xspedius Management Co.	)	
Of Charleston, LLC, Xspedius Management	)	
Co. of Columbia, LLC, Xspedius Management Co.	)	
Of Greenville, LLC, and Xspedius Management Co.	)	
Of Spartanburg, LLC	)	
	)	
Of an Interconnection Agreement with	)	
BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as Amended	)	
	)	

BELLSOUTH'S MEMORANDUM IN REPLY
TO JOINT PETITIONERS' RESPONSE
TO BELLSOUTH'S MOTION TO STRIKE

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Reply Memorandum that supplements the primary authority cited in its Motion to Strike ("Motion") with additional authority in order to address the Joint Petitioners' statement that BellSouth's Motion is "without foundation in law, fact, advisory text, or common practice."[1] BellSouth acknowledges that this is a serious issue to present to the Commission, and it does not do so lightly. In its Motion to Strike (as well as in this Reply), BellSouth consistently approaches this situation as though it arose as a result of

[1] *See* Response to BellSouth's Motion to Strike at 1.

mistake and not intentional conduct. Even under that approach, the fact remains that: a conflict existed, the facts leading to that conflict were not disclosed to BellSouth or the Commission, and as a result, a lawyer has represented one of his clients (NuVox) in a manner that is adverse and detrimental to another of his clients (BellSouth).[2] This never should have happened, and it would not have happened had the facts giving rise to the conflict been disclosed before the hearing. Unfortunately, it did happen and, as explained below, it prejudiced BellSouth's rights in this proceeding.

BellSouth would not have waived this conflict had it been consulted about it, BellSouth is not willing to waive this conflict after-the-fact, and BellSouth is not willing to waive its right to an appropriate and focused remedy to cure the prejudice to its interests. In most cases involving a conflict of this nature, the remedy is a new trial, which necessarily encompasses striking everything that was put in the record during the original trial. BellSouth sought a more narrowly-tailored remedy – striking the testimony that never should have been presented without striking similar testimony that presumably was not tainted by this conflict.[3] There are, of course, other remedies available, and BellSouth is not opposed to the Commission's considering and ordering any remedy that is appropriate under the circumstances of this case. Nor does BellSouth object to

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[2] As explained in BellSouth's Motion and below in this Reply, Mr. Russell is an attorney who represented NuVox at the same time that he represented BellSouth by virtue of the imputation provisions of Rule 1.10.

[3] Mr. Russell accepted a position with Nelson Mullins on May 18, 2005. *See* Letter Dated June 14, 2005 (attached to BellSouth's Motion to Strike). It is not clear when Nelson Mullins extended a formal offer of employment to Mr. Russell. If that occurred before Mr. Russell testified for NuVox and against BellSouth in the other state proceedings that have become part of the record in this docket by way of the submission of transcripts, that testimony could also be tainted and subject to being stricken from the record. BellSouth has not yet sought discovery on those matters, but it reserves the right to do so.

discussing other appropriate methods of remedying the situation with the Joint Petitioners.

INTRODUCTION

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice."[4] The Response filed by the Joint Petitioners suggests that in proceedings before the Commission, no special responsibilities for the quality of justice attach to an officer of the legal system as long as he does not officially become "counsel of record" in a proceeding. If that were the case, nothing could be done to prevent an attorney who has represented Company A for years, and who continues to do so, from: (1) indirectly advocating legal and policy positions for Company B, and against Company A, in the form of assisting in the development of case strategy, the preparation of pleadings, and the drafting of motions and briefs; and (2) directly advocating legal and policy positions for Company B, and against Company A, in the form of live testimony on behalf of Company B. Adopting the Joint Petitioners' position would seriously erode the public's confidence in the legal system, and it would irreparably harm the Commission's ability to carry out its duty to fairly and efficiently administer justice in proceedings before the Commission. Nothing suggests that the General Assembly, the Supreme Court, or the public intends for an officer of the legal system to be allowed to do this.

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[4] S.C.A.C.R. 407, Preamble: A Lawyer's Responsibilities.

DISCUSSION

The following sections of this Reply demonstrate that: (a) the Rules of Professional Conduct apply to this situation; (b) an actual conflict of interest exists; (c) the Commission has the responsibility and the authority to remedy the prejudice that results when live and adverse testimony is presented by an attorney with a conflict; and (d) striking the testimony is an appropriate and reasonable way to remedy this prejudice while properly balancing the equities of the situation.

A. The Rules of Professional Conduct apply in this situation because the attorney-witness had an attorney-client relationship with NuVox,[5] he "represented" NuVox, and he "advocated for" NuVox.

Rule 1.7 of the South Carolina Rules of Professional Conduct prohibits an attorney from "representing" one client in a manner that is directly adverse to another client without the consent of both clients.[6] This rule is not limited to "representation" in the sense of serving as counsel of record in an adversarial proceeding. To the contrary, it applies broadly to any and all forms of "representation," including without limitation representing clients in negotiations, preparing wills, administering estates, and providing advice and counsel to corporations.[7]

During the hearing, Mr. Russell advocated NuVox' legal and policy positions from the witness stand and not from counsel's table.[8] The chair he occupied when he

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[5] As explained below, Mr. Russell has testified that as Nuvox's in-house counsel, he provided legal counsel to NuVox and considered himself a lawyer for NuVox

[6] S.C.A.C.R. 407, Rule 1.7.

[7] See S.C.A.C.R. 407, Rule 1.7, Comment ("Other Conflict Situations"). See also S.C.A.C.R. 407, Preamble: A Lawyer's Responsibilities ("As a representative of clients, a lawyer performs various functions," including those of an advisor, an advocate, a negotiator, and an intermediary).

[8] The Joint Petitioners argue that "every single witness testifying before the Commission" advocates a position, (Response at 5) and they seem to suggest that this

advocated these positions, however, does not change the facts that he had an attorney-client relationship with NuVox, he was advocating for NuVox, and he was "representing" NuVox in such a manner that the Rules of Professional Conduct governed his actions in this case. This is clear from a 1997 American Bar Association Formal Opinion that addresses when the Model Rules of Professional Conduct do and do not apply to an attorney who testifies as an expert witness in a proceeding.[9]

This Formal Opinion concludes that the Model Rules do not apply if the testifying attorney-expert has not established an attorney-client relationship with the party that calls the attorney as a witness. Conversely, the Formal Opinion makes it clear that the Model Rules do, in fact, apply if the testifying attorney-expert has established an attorney-client relationship with the party calling the attorney as a witness. The Opinion, for example, states that:

> The answers to these and related questions discussed in this Opinion depend in part upon whether the lawyer expert either has a client-lawyer relationship with the party or is engaged in providing the party with a "law-related service" within the purview of Model Rule 5.7. In either case, the lawyer expert would in that capacity be subject to the Model Rules, including Rule 1.7 ("Conflict of Interest: General Rule") and Rule 1.9 ("Conflict of Interest: Former Client"), and the conflict of interest of the

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means that lawyers who do so are no more bound by the Rules of Conduct than are non-lawyers who do so. That simply is not the case. Just as both lawyers and non-lawyers can advocate positions before the Commission as policy witnesses, both lawyers and non-lawyers can advocate positions before nonadjudicative bodies. See S.C.A.C.R. 407, Rule 3.9 (Comment). When lawyers do so, however, they are bound by the Rules of Professional Conduct which, obviously, are not applicable to non-lawyers. The comment to Rule 3.9 explains that the Rules "may subject lawyers to regulations inapplicable to advocates who are not lawyers," but "legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts." Similarly, the Commission, parties to proceeding before the Commission, and the public have a right to expect lawyers advocating positions as policy witnesses to comply with the Rules of Professional Conduct.

[9] ABA Formal Opinion 97-407 (May 13, 1997). A copy of this Opinion is attached as Exhibit A.

> lawyer expert would be imputed under Rule 1.10 to all lawyers associated with him in a firm.[10]

The Formal Opinion explains that an attorney who is retained to function purely as a non-advocate, objective, attorney-expert witness is not subject to the Rules of Professional conduct:

> as long as the lawyer's role is limited to service as a testifying expert and this is explained at the outset, the client of the law firm which has engaged the testifying expert's services cannot reasonably expect that the relationship thus created is one of client-lawyer.
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> * * *
>
> [The testifying attorney-expert] is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates. A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert.[11]

The Formal Opinion then turns to consulting experts, whose duties include assisting a party in advocating its position:

> In contrast, protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is not expected to testify.
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> * * *
>
> In sum, the lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct.[12]

Finally, the Formal Opinion recognizes that an attorney that testifies easily can assume the role of an advocate for the client and that when he does, he becomes bound by the Rules of Professional Conduct:

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10 Exhibit A at 1.

11 Exhibit A at 2 (emphasis added).

12 Exhibit A at 3.

> The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice. The testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case.
>
> When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the [trial counsel's] client. The lawyer expert then must exercise special care to assure that the [trial counsel] and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer's expert testimony by undermining its objectivity. The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as expert consultant.[13]

At least one federal court has cited this Formal Opinion with approval, noting that the language of Rules 1.7 and 1.10 addresses "situations involving the representation of clients in an attorney-client relationship."[14]

Other authority holds that these Rules apply even in the absence of an attorney-client relationship.[15] The California Court of Appeals, for instance, found as a matter of law that an attorney violated Disciplinary Rule 3-310(C)[16] by serving a party's Rule 30(b)(6) witness in a manner that was directly adverse to one of the firm's clients. The attorney and his firm contended that "because [the attorney] merely served [the party] as

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13 Exhibit A at 3 (emphasis added).

14 *See Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F.Supp.2d 938, 944 (N.D. Ill. 2001). In that case, the court declined to disqualify the testifying attorney, holding that the party and the testifying attorney "do not have an attorney-client relationship" because "there is no dispute that [the party] engaged the [testifying lawyer] only to be testifying expert – and nothing more." *Id.* at 945 (emphasis added). In sharp contract, and as explained below, it is clear that Mr. Russell had an attorney-client relationship with NuVox and that he was engaged to do much more than merely serve as an objective, testifying witness.

15 *See American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 117 Cal. Rptr. 2d 685 (Cal. Ct. App. 2002) and cases cited therein.

16 This is the Disciplinary Rules' counterpart to Rule 1.7 of the Rules of Professional Conduct. *See Id.* at 696.

a federal rule 30(b)(6) witness, there was no attorney-client relationship and thus there could be no violation of [the Rule]."[17] The Court disagreed, stating that:

> Application of Rule 3-310(C) does not require representation of both clients *as an attorney.* The discussion section which follows Rule 3-310 states: "Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship."[18]
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> * * *
>
> Professional responsibilities do not turn on whether a member of the State Bar acts as a lawyer. One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter.[19]
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> * * *
>
> [The attorney] was obligated to act as [the party'] witness and to answer the questions put to him at the deposition to the best of his ability, and to avoid being found an inadequate rule 30(b)(6) deponent. As [the client's] attorney, he also was obligated to preserve [the client's] confidences. Thus, regardless of whether or not he was giving legal advice to [the party], the situation presented a conflict between the fiduciary duties owed to [the party] and those owed to [the client].[20]

The Court, therefore, concluded that:

> the circumstances presented here fall within the purview of the prohibition of Rule 3-310(C) even though [the attorney] was not engaged to render legal advice to [the party]. For purposes of the rule and the perils it seeks to avoid, [the attorney's] acting as a federal rule 30(b)(6) representative for [the party] placed him in a position of trust where he could be compelled to choose which of two conflicting loyalties he would honor. Defendants' challenge, as a matter of law, to the jury's finding that [the attorney and his firm] breached their fiduciary duty by violating Rule 3-310(C) must fail.[21]

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17 *Id.*

18 *Id.*

19 *Id.* at 697.

20 *Id.* at 698.

21 *Id.*

Thus, even if Mr. Russell were not in an attorney-client relationship with NuVox when he testified in this proceeding, the Rules of Professional Conduct applied to him.

Mr. Russell, however, was in an attorney-client relationship with NuVox when he advocated NuVox's legal and policy positions during the hearing. At that time, he was NuVox's Vice President, Regulatory and Legal Affairs[22] and he was "responsible for legal and regulatory issues related to or arising from NuVox's purchase of interconnection, network elements, collocation, and other services from BellSouth."[23] He was "primarily responsible for the negotiation" of the existing interconnection agreement between NuVox and BellSouth, and he "participated actively in the negotiation of the Agreement that is the subject of this arbitration."[24] During a deposition taken in the North Carolina proceedings, Mr. Russell acknowledged that he provided legal counsel to NuVox and that he considered himself a lawyer for NuVox.[25]

Additionally, Mr. Russell was not simply providing objective factual information when he testified. As explained at pages 5 through 6 of BellSouth's Motion, NuVox's in-house counsel was diligently advancing NuVox's objectives by advocating NuVox's

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22 Direct Testimony of Joint Petitioners at p. 8.

23 *Id.*

24 *Id.* Upon joining Nelson Mullins, Mr. Russell was prohibited from continuing to negotiate the Agreement on behalf of either BellSouth or NuVox. See S.C.A.C.R. 407, Rule 1.7, Comment ("Other Conflict Situations") ("a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other.") and Rule 1.10 (imputing the disqualifications of any Nelson Mullins attorneys to Mr. Russell). The same Rules that prohibit him from negotiating on behalf of either client also prohibits him from taking the stand and advocating legal and policy positions in favor of one client and adverse to the other.

25 *See* Exhibit B (excerpts from the transcript of this deposition) at pp. 5-6. This deposition transcript is in the record in this proceeding by virtue of the Hearing Officer's Directive, dated May 31, 2005, that grants the Joint Motion Regarding Procedure the parties filed on May 26, 2005. That Joint Motion provides that "[t]he written discovery and depositions from the North Carolina proceeding will be submitted into the record in this docket." *See* Joint Motion at p. 3, ¶2.

legal and policy positions in this docket. As explained in one of the South Carolina Ethics Advisory Opinions the Joint Petitioners cite in their Response,[26] this is the function of an advocate and not a mere witness: "[t]he roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." BellSouth is well within its rights to object when a member of a firm that represents BellSouth advocates for, or represents, a party in a matter that is directly adverse to BellSouth's interests.

The Rules of Professional Conduct undoubtedly would apply if Mr. Russell had presented the same legal and policy arguments that he presented in his testimony in the form of a post-hearing brief. The Rules of Professional Conduct undoubtedly would apply if he had presented the same legal and policy arguments in the form of oral argument. There is no reasonable way to conclude that the Rules of Professional Conduct somehow do not apply when he takes the stand as in-house counsel to NuVox and presents the same legal and policy arguments in favor of NuVox in the form of written and oral testimony.

B. An actual conflict of interest exists.

The Rules provide that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule[] 1.7 . . . ."[27] This rule of imputed disqualification is based on a fundamental cornerstone of an attorney's ethical responsibilities – loyalty to

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[26] South Carolina Ethics Advisory Opinions No. 90-05 (attached as Exhibit B to the Joint Petitioners' Response to BellSouth's Motion).

[27] South Carolina Appellate Court Rule ("S.C.A.C.R.") 407, Rule 1.10(a)(emphasis added).

the client[28] – and it acknowledges that "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client."[29] It also acknowledges that "each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."[30]

At the time Mr. Russell submitted his pre-filed Rebuttal testimony and at the time he testified during the hearing, several attorneys in his firm were representing BellSouth in various matters.[31] None of these attorneys could have advocated legal and policy positions against BellSouth's interests in this docket, because "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believed the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."[32] Like the rule of imputed disqualification, this rule is based on loyalty to the client, and absent the consent of both clients after consultation,[33] it prohibits a lawyer from acting as an advocate "against a person the lawyer represents in some other matter,

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28 *Id.*, Comment ("Principles of Imputed Disqualification").

29 *Id.*

30 *Id.*

31 Exhibit C contains non-privileged documents demonstrating Nelson Mullins' representation of BellSouth and its affiliates in certain matters. These documents reflect some, but by no means all or even most, of the matters in which Nelson Mullins represents BellSouth.

32 *Id.*, Rule 1.7(a).

33 The fact that consent of both clients is required is clear not only from the plain language of the Rule, but also from South Carolina caselaw. The Court of Appeals has "recognize[d] that an adverse effect on an attorney's exercise of independent judgment is presumed when an attorney takes an adversary position toward another client" and that such representation simply is not permitted unless "full disclosure is given and the client's consent is obtained . . . ." *See Bankers Trust of South Carolina v. Bruce*, 323 S.E.2d 523, 530 n.1 (S.C. Ct. App. 1984). The Court further explained that "there must be a full and effective disclosure of all material, relevant facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to give an informed consent." *Id* at 530.

even if it is wholly unrelated."[34] BellSouth was never consulted about, and did not consent to, any Nelson Mullins attorney representing NuVox in this docket. Rule 1.7, therefore, directly disqualified several Nelson Mullins attorneys from advocating legal and policy positions against BellSouth in this docket, and Rule 1.10 imputes that same disqualification upon every other Nelson Mullins attorney, including Mr. Russell himself.

Unfortunately, this is not a situation in which an attorney has ended his relationship with one firm (and the clients of that firm) and has begun a new relationship with another firm (and the clients of that other firm).[35] At the time he submitted his pre-filed Rebuttal testimony and at the time he testified during the hearing, Mr. Russell was both: (1) associated with a law firm that represents BellSouth; and (2) Vice President of Legal Affairs for NuVox.[36] He was serving two clients when he testified in this hearing, and he pursued the interests of one client over, and to the detriment of, the interests of

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[34] *Id.*, Comment ("Loyalty to a Client"). See also *Id.*, "Conflicts in Litigation" (Rule 1.7(a) "prohibits representation of opposing parties in litigation," and "a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated" unless "both clients consent upon consultation.").

[35] Conflicts of interest can arise as a result of successive representation (which would have occurred if, upon joining Nelson Mullins, Mr. Russell had ceased advocating for NuVox and attempted to begin advocating for BellSouth in this docket) or as a result of concurrent representation (which is the case here). As the California Court of Appeals has noted, "the rules governing such conflicts differ." *Cal West Nurseries v. Superior Court*, 29 Cal. Rptr. 3d 170, 173 (Cal. Ct. App. 2005). While a violation of confidentiality is relevant to successive representation, "the absence of a violation of confidentiality is irrelevant" in cases of concurrent representation. *Id.* This is because "[t]he primary value at stake in cases of simultaneous or dual representation is the attorney's duty – and the client's legitimate expectation – of loyalty, rather than confidentiality." *Id.* at 174. Similarly, "the 'substantial relationship' test does not apply where there is concurrent representation on behalf of and adverse to the same client. Absent informed written consent, a lawyer may not concurrently represent clients who have actual or potential conflicts; nor may a lawyer represent one client against another in an unrelated matter." *Id.* at 173.

[36] *See* Letter Dated June 14, 2005 (attached as Exhibit A to BellSouth's Motion to Strike).

another client. While some conflict of interest issues can be fairly subtle on the surface, this is not one of them. As the Fourth Circuit Court of Appeals has noted, "[an attorney's] representation of conflicting interests . . . is not always as apparent as when he formally represents two parties who have hostile interests."[37]

C. The Commission has the responsibility and the authority to remedy the prejudice that results when live and adverse testimony is presented by an attorney with a conflict.

Conflicts of interests are detrimental not only to the clients involved, but also to the public's confidence in and the integrity of legal proceedings. As the Supreme Court of South Carolina has noted:

> It is a vital necessity to the well-being of society and the administration of justice that attorneys, who are officers of the court and a part of our judicial system, should exhibit the most scrupulous care in conducting themselves and their business in such a manner as will secure and maintain the respect and confidence of the public in an attorney and the profession generally.[38]

Similarly, the Fourth Circuit Court of Appeals has held that conflict issues are to be decided "with a view of preventing 'the appearance of impropriety'" and without considering "whether the motives of counsel in seeking to appear despite his conflict are pure or corrupt; in either case the disqualification is plain."[39] Similarly, the federal Bankruptcy Court in South Carolina has noted that "it is in the public's interest to see that those who practice before the Court adhere to the South Carolina Code of Professional

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37 *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991).

38 *Norris v. Alexander*, 142 S.E.2d 214, 217 (S.C. 1965). *See also Kala v. Aluminum Smelting & Refining Co.*, 688 N.E.2d 258, 262 (Ohio 1998) ("Because of the importance of these ethical principles, it is the court's duty to safeguard the preservation of the attorney-client relationship. In doing so, a court helps to maintain public confidence in the legal profession and assists in protecting the integrity of the judicial proceeding.").

39 *United States v. Clarkson*, 567 F.2d 270, 273 n.3 (4th Cir. 1977).

Responsibility"[40] and that "a motion to disqualify [based on a conflict of interest] is a matter subject to the court's general supervisory authority to ensure fairness to all who bring their case to the judiciary for resolution."[41]

The statutes and rules applicable to hearings before this Commission are entirely consistent with these principles. Commission hearings, for example, "must be conducted under dignified and orderly procedures designed to protect the rights of all parties."[42] Further, "[a]ll persons appearing in a representative capacity before the commission in its proceedings should conform to the standards of ethical conduct required of attorneys practicing before the courts of this State."[43] If a person fails to comply with these ethical standards of conduct, "the Commission may decline to permit such individual to act in a representative capacity in any proceeding before the Commission."[44]

1. Had the facts giving rise to the conflict been brought to the attention of the Commission or the parties, BellSouth immediately would have sought and been entitled to an order prohibiting Mr. Russell from advocating legal and policy positions adverse to BellSouth in this proceeding.

As explained above in Section B, an actual conflict of interest exists. Had BellSouth been made aware of the facts giving rise to this conflict, it immediately would

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40 *In Re: Ducane Gas Grills, Inc.*, 320 B.R. 312, 319 (S.C. Bkr. 2004).

41 *Id.* at 318.

42 S.C. Code Ann. §58-3-225(A).

43 S.C. Code Ann. §58-3-225(B). These standards of ethical conduct provide that "[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question" of resolving questions of a conflict of interest. S.C.A.C.R. 407, Rule 1.7, Comment ("Conflict Charged by an Opposing Party"). *See also, Kala v. Aluminum Smelting & Refining Co.*, 688 N.E.2d 258, 261 (Ohio 1998)("As a starting principle, a court has inherent authority to supervise members of the bar appearing before it; this necessarily includes the power to disqualify counsel in specific cases."); *Zarco Supply Co. v. Bonnell*, 658 So.2d 151, 154 (Fla. Ct. App. 1995)("Opposing counsel may seek disqualification where the conflict of interest clearly calls into question 'the fair or efficient administration of justice.'").

44 Commission Reg. 103-867.

have moved to disqualify Mr. Russell from taking part in this proceeding. The Commission, in turn, would have been required to grant the motion.

This conclusion is clear and necessarily follows from a case the Supreme Court of South Carolina decided two months ago.[45] In *State v. Gregory*, an attorney representing a criminal defendant in state court in Aiken later began representing an Aiken County Assistant Solicitor in her divorce action.[46] The attorney moved to be relieved as counsel, but the trial judge denied the motion because "the assistant solicitor would not participate in the trial," the defendant "had not shown that he was prejudiced," and "defense counsel had not done anything inappropriate."[47] Although this ruling was "addressed to the sound discretion of the trial judge" and would "not be disturbed absent an abuse of discretion," the Supreme Court reversed the ruling on appeal.[48]

The Supreme Court noted that "[a]n actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's,"[49] and it explained that "[t]he interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client."[50] The Court then cited a Fifth Circuit decision that held "where the law firm retained to represent the defendant . . . also represented the state prosecutor in an unrelated civil trial, there was an actual conflict of

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45 *See State v. Gregory,* 612 S.E.2d 449 (S.C. 2005).
46 *Id.* at 450.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*

interest, and the conflict rendered the trial fundamentally unfair."[51] In light of this analysis, the Court concluded that:

> [the] attorney had an actual conflict because he placed himself in a "situation inherently conducive to divided loyalties" by simultaneously representing [the defendant] and the assistant solicitor who was handling his criminal case. Given the actual conflict, [the defendant] is not required to demonstrate prejudice.[52]

The Court, therefore, reversed the defendant's conviction and ordered a new trial.[53]

This very recent and controlling ruling of the Supreme Court of South Carolina is consistent with other decisions across the country. The Supreme Court of Colorado, for example, disqualified all attorneys in a firm from participating in an action where some attorneys in the firm represented the defendant at the same time that another attorney in the same firm represented a prosecution witness.[54] The trial court, which had ruled that the firm was not disqualified, "emphasized that there was no evidence that an improper exchange of confidences had occurred" and that "'the ethics of the legal profession' acted as a natural 'ethical wall' of silence to prevent such disclosure in the future."[55] The Supreme Court of Colorado, however, disagreed, noting that under the imputed disqualification provisions of Rule 1.10(a), "[w]hen an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm."[56] The Court found that Rule 1.7(a) disqualified the attorney representing the prosecution's witness from

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51 *Id.* (emphasis added).
52 *Id.* at 451.
53 *Id.*
54 *People v. District Court*, 951 P.2d 926, 928 (Colo., 1998).
55 *Id.* at 929.
56 *Id.* at 930.

representing the defendant, and that this disqualification was imputed to all members of the firm by virtue of Rule 1.10(a).[57]

Similarly, the California Court of Appeals has ruled that lawyers in the same firm may not represent clients with adverse interests.[58] The Court explained that "[a] client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship."[59] By virtue of the imputed disqualification provisions of Rule 1.10(a), this reasoning applies with equal force to in this docket.

2. The Commission has the responsibility and the authority to remedy the prejudice that results when live and adverse testimony is presented by an attorney with a conflict.

The only reason that BellSouth did not move to disqualify Mr. Russell from participating in this hearing is that BellSouth did not learn of the facts giving rise to the conflict until after the hearing was concluded.[60] The fact that neither the Commission nor BellSouth knew of these facts until after the hearing does not eliminate the Commission's responsibility to remedy the situation or BellSouth's right to have the situation remedied – it merely affects the remedy that is available. It is both possible and necessary to put

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57 *Id.* at 932.

58 *Cal West Nurseries v. Superior Court*, 29 Cal. Rptr. 3d 170, (Cal. App. 2005).

59 *Id.* at 174.

60 The Joint Petitioners accurately state that Mr. Russell has appeared in arbitration proceedings in seven other BellSouth states and that Mr. Russell's testimony "became evidence [in this docket] without objection." *See* Response at 2, 7. The reason there was no objection in this docket, of course, is because BellSouth was not aware of the facts that formed the basis for objection. The reason there was no objection in the ninth and final arbitration proceeding, which went to hearing after BellSouth filed its Motion to Strike, is because none was required – Mr. Russell did not appear at that hearing, and another witness adopted his pre-filed testimony in that proceeding. *See* Exhibit D.

the parties in the position they would have been in had Mr. Russell been disqualified from testifying. BellSouth's proposal to strike Mr. Russell's testimony from the record does just that.

The Joint Petitioners appear to argue that leaving Mr. Russell's testimony in the record does no harm to BellSouth because the parties agreed to submit testimony Mr. Russell presented in other hearings (before BellSouth was aware of the conflict) into the record of this proceeding.[61] This argument must fail for several reasons. First, as explained in BellSouth's Motion to Strike, it is prejudicial to BellSouth to have the Commission make determinations of credibility, bias, or the weight to be given to the evidence based on the live testimony of a witness who never should have testified in this docket. Second, as noted above, allowing testimony that was presented under an undisclosed conflict of interest to remain in the record would be contrary to state statutes, the Commission's rules, and the public policy of this state. Third, when an actual conflict exists, prejudice is presumed and the aggrieved client is entitled to a remedy.[62] Fourth, if Mr. Russell presented any testimony during the hearing that is in addition to, different from, or otherwise not identical to his testimony from other proceedings that was entered into the record in this docket, BellSouth is prejudiced by its inclusion in the record because Mr. Russell never should have presented it in the first place.[63]

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61 *See* Response at 13.

62 *State v. Gregory,* 612 S.E.2d at 451 (remedying a conflict by ordering a new trial, noting that "[g]iven the actual conflict, [the defendant] is not required to demonstrate prejudice."). Ordering a new trial necessarily encompasses striking everything that was put in the record during the original trial.

63 Conversely, in the unlikely event that the testimony he presented during the hearing is identical to his prior testimony that is in the record, the Joint Petitioners cannot be heard to complain that striking his testimony causes them any hardship.

D. Striking Mr. Russell's testimony is an appropriate and reasonable way to remedy this prejudice while properly balancing the equities of the situation.

The Joint Petitioners suggest that the Commission should do nothing to remedy the conflict because "there is another party in this case – Xspedius – that would be equally affected and unfairly prejudiced should Mr. Russell's testimony be excluded."[64] In considering this argument, the Commission must consider the fact that Xspedius chose on its own accord (and over BellSouth's objection) to pursue this arbitration jointly with NuVox, and it chose on its own accord to have Mr. Russell (instead of an Xspedius employee) to be the only witness to advocate legal and policy positions regarding certain issues live from the stand in this proceeding. Had Xspedius not been pleased with the substance of a response Mr. Russell provided to a question during the hearing, it could not ask the Commission to disregard the answer or to allow Xspedius to supplement the answer simply because Mr. Russell was a NuVox employee and not an Xspedius employee. Similarly, Xspedius should not now be heard to complain of any consequences that may result from the participation of the attorney it allowed to advocate legal and policy positions on its behalf during the hearing.

CONCLUSION

It is clear that an actual conflict existed and that BellSouth was prejudiced by the conflict. It is clear that a remedy is required. BellSouth's proposed remedy of striking the offending testimony is appropriate, but BellSouth does not object to the Commission's fashioning another remedy that is appropriate under the circumstances.

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64 Response at 12-13.

Nor does BellSouth object to discussing other appropriate methods of remedying the situation with the Joint Petitioners.

Respectfully submitted, this 27th day of June, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

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590969

EXHIBIT A

American Bar Association

LAWYER AS EXPERT WITNESS OR EXPERT CONSULTANT

May 13, 1997

A lawyer serving as an expert witness to testify on behalf of a party who is another law firm's client, as distinct from an expert consultant, does not thereby establish a client-lawyer relationship with the party or provide a "law-related service" to the party within the purview of Model Rule 5.7 such as would render his services as a testifying expert subject to the Model Rules of Professional Conduct. However, to avoid any misunderstanding, the testifying expert should make his limited role clear at the outset. Moreover, if the lawyer has gained confidential information of the party in the course of service as a testifying expert, the lawyer may as a matter of other law have a duty to protect the party's confidential information from use or disclosure adverse to the party.

Model Rules 1.7(b) and 1.10(a) apply to the lawyer's representation of a client adverse to a party for whom he is serving as a testifying expert. If the duty of confidentiality to the party on whose behalf the lawyer serves as a testifying expert would "materially limit" the responsibilities of the lawyer to one of his clients, the lawyer and any firm with which the lawyer is associated may be prohibited from concurrently representing that client. Ordinarily it would not be reasonable for the lawyer to believe in those circumstances that the representation of the client will not be adversely affected, and thus client consent would not permit the representation. Moreover, even though these requirements of the Model Rules are satisfied, other law, including the law of client-lawyer privilege and the law of agency, may prohibit the lawyer and his law firm from representing the client, unless the party on whose behalf the lawyer serves as a testifying expert waives its right to object.

After the testifying expert relationship has concluded, the testifying expert and his law firm may be precluded from representing a client in a matter in which use of the party's confidential information would be necessary. Model Rules 1.9(a) and 1.9(c) do not apply because the party for whom the lawyer was asked to testify is not a former client. Nevertheless, the responsibilities of the lawyer under other law to maintain the confidentiality of the party's information may materially limit the representation in the subsequent matter, and it may not be reasonable for the lawyer to believe that the representation would not be adversely affected; if so, Model Rules 1.7(b) and 1.10(a) would bar the subsequent representation.

Opinion

The Committee has been asked whether, under the Model Rules of Professional Conduct, a lawyer who is retained to testify as an expert witness on behalf of a party who is another law firm's client may undertake a representation directly adverse to that party. Further, if the lawyer expert may not undertake the representation adverse to a party on whose behalf he is currently serving as a testifying expert, may the lawyer undertake the adverse representation after his testimony on behalf of the party has been concluded? Finally, if the lawyer in either situation is disqualified, may another lawyer with whom the lawyer is associated in a firm nevertheless undertake the representation?

The answers to these and related questions discussed in this Opinion depend in part upon whether the lawyer expert either has a client-lawyer relationship with the party or is engaged in providing the party with a "law-related service" within the purview of Model Rule 5.7. In either case, the lawyer expert would in that capacity be subject to the Model Rules, including Rule 1.7 ("Conflict of Interest: General Rule") and Rule 1.9 ("Conflict of Interest: Former Client"), and the conflict of interest of the lawyer expert would be imputed under Rule 1.10 to all lawyers associated with him in a firm. Based on the analysis and assumptions in Part I of this Opinion, the Committee concludes that under the Model Rules a lawyer serving solely as a testifying expert witness on behalf of another law firm's client, as distinct from a consultant providing expert legal advice to the firm and its client, does not thereby occupy a client-lawyer relationship with the party for whom he may be called to testify, and is not thereby providing law-related services. The lawyer nevertheless should take reasonable precautions to avoid confusion in the minds of

the retaining law firm and its client as to the different duties applicable to service as a testifying expert.

Moreover, the lawyer expert witness has duties under other law, such as a duty to protect the confidences of the party for whom the lawyer may testify, that may limit the lawyer and his law firm in the representation of a client in a matter adverse to the party for whom he serves or previously has served as a testifying expert. [FN1] These limitations on the lawyer testifying expert are analyzed in Part II of this Opinion.

I. A Lawyer Serving Solely as a Testifying Expert as Distinct from an Expert Consultant Does Not Thereby Occupy a Lawyer-Client Relationship or Provide a "Law-related Service."

A lawyer who is expert on a legal subject may be engaged to serve one of two distinct roles: as an expert witness who is expected to testify at a trial or a hearing as a "testifying expert," or as a nontestifying "expert consultant." In this Part I, the Committee (a) analyzes the role of the lawyer testifying expert as distinguished from the role of the lawyer expert consultant in respect of whether the testifying expert forms a client-lawyer relationship; (b) cautions as to the lawyer's duty to clarify his responsibilities in either role, especially in circumstances where the roles become blurred; and (c) examines whether the role of testifying expert falls within the purview of Model Rule 5.7.

(a) A lawyer employed as a testifying expert does not form thereby a client-lawyer relationship.

The Model Rules note that "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." MODEL RULES OF PROFESSIONAL CONDUCT, Scope [15] (1995). Thus, the question whether a testifying expert and the party for whom he is expected to testify have formed a relationship sufficient to invoke the ethical obligations of the Model Rules is generally a question of fact determined by principles beyond those set forth in the Model Rules.

The Committee previously has stated that, as a general matter, a client-lawyer relationship can "come into being as a result of reasonable expectations [of the client] and a failure of the lawyer to dispel these expectations." ABA Formal Opinion 95-390 at 8; see also ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:103-105 (1989). Clients reasonably expect that lawyers whom they consult to perform legal services for them are bound by certain basic professional obligations, including duties of confidentiality and loyalty, and avoidance of conflict of interest.

The Committee believes, however, as long as the lawyer's role is limited to service as a testifying expert and this is explained at the outset, the client of the law firm which has engaged the testifying expert's services cannot reasonably expect that the relationship thus created is one of client-lawyer. A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-lawyer expert witness. The testifying expert provides evidence that lies within his special knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. To be sure, the testifying expert may review selected discovery materials, suggest factual support for his expected testimony and exchange with the law firm legal authority applicable to his testimony. The testifying expert also may help the law firm to define potential areas for further inquiry, and he is expected to present his testimony in the most favorable way to support the law firm's side of the case. He nevertheless is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates. A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, is inconsistent with the duty of a testifying expert. Moreover, if an expert may testify at trial and his name has been provided to opposing counsel pursuant to applicable procedural rules, he may be deposed by the opposing party. Communications between the expert and the retaining law firm or its client employed by the expert in preparing his testimony ordinarily are discoverable. [FN2]

State bar ethics committees have rendered opinions on related issues that support the conclusion that a lawyer serving as a testifying expert does not thereby occupy a client-lawyer relationship with the party for whom he is engaged to testify. The Virginia State Bar, Standing Committee on Legal Ethics, Opinion 1884 (1989) was asked whether a lawyer had a conflict of interest if the lawyer executed affidavits as an expert for both the plaintiffs and the defendants in the same litigation, but on different issues. Noting that the issue, whether the expert had a client-lawyer relationship, involved a "factual determination and is beyond the purview of the committee," the committee added:

Should the attorney's capacity have been purely that of an expert witness, the Code of Professional Responsibility should be inapplicable in that situation as it does not in any way preclude an individual from serving as an expert witness for both parties to an action. [FN3]

In contrast, protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is not expected to testify. That role at least implicitly promises the client all the traditional protections under the Model Rules, including those governing counseling and advocacy, confidentiality of information and loyalty to the client. In short, a legal consultant acts like a lawyer representing the client, rather than as a witness. Unlike the testifying expert, the expert consultant need not be identified, and her legal advice and communications with the client and trial counsel are not expected to be disclosed, absent client consent after consultation. In sum, the lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct.

(b) The lawyer should assure his role as testifying expert is made clear and obtain client consent should his role change to consulting expert.

In order to avoid any misunderstanding that no client-lawyer relationship is created, the testifying expert should make his role clear at the outset of the engagement. A written engagement letter accepted by both the engaging law firm and its client is much to be preferred. The engagement letter should define the relationship, including its scope and limitations, and should outline the responsibilities of the testifying expert, especially regarding the disclosure of client confidences. It is the responsibility of the firm that has engaged the testifying expert to assure that its client is fully informed as to the nature of the testifying expert's role. See Model Rule 1.4.

The distinction between the role of the testifying expert and the role of the expert consultant can, of course, become blurred in actual practice. The testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case.

When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm's client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer's expert testimony by undermining its objectivity. [FN4] The lawyer also is bound by the Model Rules relating to conflicts of interest and imputed disqualification with respect to service as expert consultant. See infra nn. 10, 11 and 13.

(c) The testifying expert does not provide a "law-related service."

A question remains under the Model Rules whether a lawyer who serves solely as a testifying expert provides "law-related services" as contemplated by Model Rule 5.7. [FN5] If so, the lawyer testifying expert would be subject to all the Model Rules unless the provision of the services satisfies the requirements of subparagraphs (a)(1) or (a)(2) of Rule 5.7, even though he has no client-lawyer relationship with the party on whose behalf he is to testify.

In answering the question, the Committee finds significant but not dispositive that Model Rule 5.7 is intended to address potential conflicts that arise when lawyers engage in businesses ancillary to their law practices, and that nowhere in the extensive literature surrounding adoption of Model Rule 5.7 is it suggested that a problem exists when lawyers serve as testifying experts. [FN6] Of greater significance is that the way in which testifying experts provide their services eliminates as a practical matter the need for the protection that Model Rule 5.7 was designed to afford recipients of law-related services in order to avoid any misperception by the recipient of the services that the protections normally part of the client-lawyer relationship apply. See Rule 5.7 Comment [1]. As noted in Part I.(b), the testifying expert should appropriately define his role at the outset of the engagement so that the law firm's client will not be confused that the Rules of Professional Conduct apply in the relationship with the testifying expert.

While some members of the Committee believe that the plain language of Rule 5.7 encompasses testifying expert services rendered in "circumstances ... not distinct from the lawyer's provision of legal service to client," Model Rule 5.7(a)(1), the clear majority believes that the words do not apply. In the view of the majority, lawyers serving as

testifying experts do not offer their services "in conjunction with" the legal services they offer to their clients, Model Rule 5.7(b). Rarely does a testifying expert provide services directly to a client. The client invariably is represented by its own trial counsel, who manages the role to be played by the testifying expert in discovery, preparation and trial. Accordingly, the majority concludes that testifying expert services and trial counsel services always remain distinct with regard to a particular matter. Rule 5.7, adopted in only one jurisdiction, should not be construed to reach beyond the intent of its drafters.

For these reasons, the Committee concludes that testifying expert services are not "law-related services" under Model Rule 5.7. Thus, the testifying expert's role as a witness excludes not only a client-lawyer relationship with the party on whose behalf he is to be called, but also a law-related service provider relationship that would require all of the Model Rules to apply to his relationship. [FN7]

II. The Lawyer Testifying Expert Has Responsibilities to Others That Under the Model Rules May Limit Representation of Clients by the Lawyer or His Firm.

In this Part II, the Committee answers the questions posed at the beginning of this Opinion by analyzing the limitations that the Model Rules impose upon the lawyer and his firm as a result of his serving as a testifying expert when the lawyer is called upon (a) to represent a client concurrently in a matter adverse to the party for whom the lawyer currently is serving as a testifying expert, or (b) to represent a client after the conclusion of the testifying expert service. [FN8]

(a) Rule 1.7(b) may bar concurrent representation of a client adverse to the party for whom the lawyer is serving as a testifying expert.

The Committee assumes for purposes of this Opinion that the testifying expert owes a duty of confidentiality as well as other duties to the party on whose behalf he is engaged to testify. [FN9] Accordingly, if the testifying expert's concurrent representation of a client in a matter adverse to the party for whom the expert is to testify might be materially limited by his responsibilities as a subagent to maintain the party's confidences or by other duties he owes the party, Model Rule 1.7(b) [FN10] applies to that concurrent representation. At least in circumstances where the party's material confidential information clearly would be useful in the representation of the client, the Committee is of the opinion that the testifying lawyer could not reasonably believe that the representation of a client would not be adversely affected and, therefore, client consent is no cure. Similarly, where the testifying expert might be called upon to testify for the party and could be subject to cross-examination by a lawyer from the expert's own law firm, on behalf of a client of the firm, the representation of a client would be barred both by Model Rule 1.7(b) and by Model Rule 3.7(b). [FN11] Under Model Rule 1.10(a), [FN12] the testifying lawyer's disqualification would be imputed to his law firm.

If the lawyer reasonably concludes that despite the possibility of a material limitation, the representation of a client will not be adversely affected by his duties as a testifying expert, the consent of the client after consultation is nonetheless required. This may be true, for example, if the matter in which the lawyer will testify and the matter in which a client seeks representation are entirely unrelated, and no material confidential information that the testifying lawyer has learned from the party has relevance to the second matter.

(b) Rule 1.7(b) also may bar subsequent representation if materially limited as a result of the earlier relationship.

If the party for whom a lawyer in the firm had acted as a testifying expert later sued a client of the expert's law firm on an unrelated matter, neither the testifying expert nor his law firm ordinarily would be barred from representing the defendant client. Model Rule 1.9(a) [FN13] would not apply, not only because the matters are unrelated, but also because a client-lawyer relationship did not exist when the lawyer acted as a testifying expert for the party in the earlier litigation, and Model Rule 5.7 did not apply to the testifying expert services. Even if the matter for the client is the same as or substantially related to the earlier litigation in which the lawyer had served as a testifying expert, neither Rule 1.9(a) nor Rule 1.9(c) [FN14] would apply because the testifying expert service did not involve a client-lawyer relationship or a law-related service.

Although neither Rule 1.9(a) nor Rule 1.9(c) applies, the expert and lawyers associated in his firm nevertheless may have duties of confidentiality under other law that might materially limit the representation of the current client,

even in a matter which is unrelated to the earlier engagement. [FN15] For example, if the representation of the current client were to require the use of confidential financial information learned in his testifying role, the lawyer and his firm would be barred from undertaking the current client representation by Rule 1.7(b) and Rule 1.10(a) unless they reasonably believe the representation will not be adversely affected by the lawyer's duty of confidentiality owed the party for whom the lawyer earlier had served as a testifying expert and the current client consents after consultation.

Summary

A lawyer who serves as a testifying expert on behalf of a party represented by another law firm does not thereby occupy a client-lawyer relationship or perform a law-related service within the purview of Model Rule 5.7. He nevertheless should make the nature and scope of the relationship clear at the outset. If the lawyer's role is or later becomes that of an expert consultant for the party as described in this Opinion, a client-lawyer relationship with the party is established, and the lawyer is subject to all of the Model Rules in connection with that engagement.

Even though service solely as a testifying expert is not as such governed by the Model Rules, concurrent representation of a client adverse to the party for whom the lawyer serves as a testifying expert ordinarily is barred by Model Rule 1.7(b) as a result of constraints imposed by other law. Subsequent representation may, for the same reason, also be barred where the party's confidential information is relevant to the subsequent representation or where other factors make it unreasonable to conclude that the representation will not be adversely affected.

FN1. The Committee neither makes factual findings nor decides purely legal questions. The Committee nevertheless may assume factual and legal conclusions in order to render an opinion as to ethical responsibilities under the Model Rules, and here does so.

FN2. See, e.g., Fed.R.Civ.Proc. 26(a)(2) and 26(b), which permit broad discovery of testifying experts, but sharply limit discovery of consulting experts retained to advise in the litigation. Some courts require production of all oral and written communications by counsel with a testifying witness even though ordinarily protected as opinion work product. E.g., Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D.Cal.1991). Other courts continue to employ a case-by-case analysis and, absent compelling circumstances, deny discovery of lawyers' opinions and mental impressions communicated to testifying experts notwithstanding the 1993 changes to FRCP § 26. E.g., Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289 (W.D.Mich.1995), following Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir.1993). See also 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE & PROCEDURE: Civil 2d (1994) § 2031 at 439, noting that Bogosian probably was overruled by the 1993 amendments. See also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 141 (Proposed Final Draft No. 1 March 29, 1996) (adopting the Bogosian approach). Assuming, however, that questions are not asked at the deposition or trial about all such communications, the lawyer expert as an agent has duties of confidentiality to the principal under other law apart from duties under specific Model Rules. See RESTATEMENT (SECOND) OF AGENCY § 387 (agent's use of principal's confidences for the agent's or another's benefit is improper absent principal's consent), and § 395 (agent must not use or communicate principal's confidential information whether or not related to the transaction unless generally known or otherwise agreed) (1958); and see also id. § 396 (agent's duties continue following termination of the agency).

FN3. Other state bar ethics opinions also have found that a client-lawyer relationship does not arise between a testifying expert and the party for which the lawyer is engaged to testify. See, e.g., State Bar of S.D., Ethics Comm. Opinion 91-22 (1992) (lawyer serving as testifying expert for insurance company A defending a bad faith claim brought by insurance company B may represent an insured of insurance company B in an unrelated claim against a third party, in part because insurance company A is not the testifying expert's client); Phila. (Pa.) Bar Ass'n, Professional Guidance Comm. Opinion 88-34 (1988) (permissible [under the Pennsylvania Rules of Professional Conduct] for a lawyer to serve as a testifying expert for a party while at the same time serving as a testifying expert for the party's opponent in another unrelated suit).

FN4. See Model Rule 1.2(c) stating: "A lawyer may limit the objectives of the representation if the client

consents after consultation." Obtaining client consent after "consultation," see MODEL RULES OF PROFESSIONAL CONDUCT, Terminology (1995), is in this instance the joint responsibility of the law firm and the expert. See also Model Rules 1.4 and 1.5(e). Disclosure of all materials furnished to the expert by trial counsel, including opinion work product, may be ordered by courts following Intermedics, supra n. 2, when the testifying expert also serves as expert consultant. See, e.g., Furniture World, Inc. v. D.A.V. Thrifty Stores, Inc., 168 F.R.D. 61 (D.N.M.1996).

FN5. Model Rule 5.7 ("Responsibilities Regarding Law-related Services") states:
(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.
(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.
Model Rule 5.7 has been adopted in the Virgin Islands. Pennsylvania has adopted a similar rule that is based on the same rationale. At this date, no other jurisdiction has a rule dealing expressly with ancillary or law-related services.

FN6. Adoption of Rule 5.7 followed directly from the Stanley Commission's recommendation that "[t]he Bar should study the issue of the participation of law firms and individual lawyers in business activities, certainly where either actual or potential conflicts of interest may be involved." Report of ABA Commission on Professionalism, "... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243, 280- 81 (1986). One of three areas of concern prompting this recommendation was that
some firms now operate businesses which may provide services that those firms believe are ancillary to the practice of law--real estate development or investment banking, for example. Other firms or individual lawyers have become active in businesses which have little or nothing to do with their practice. Id. at 280.
The reports, published debates and articles surrounding the adoption of Model Rule 5.7 and its predecessor also make it clear that the perceived problems related solely to lawyers being involved in businesses ancillary to their law practices and not at all to lawyers testifying as experts. See, e.g., ABA Section of Litigation, Recommendation and Report on Law Firms' Ancillary Business Activities (1990) (recommending that the ABA adopt a rule prohibiting ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 82); ABA Special Coordinating Committee on Professionalism, Special Report to the House of Delegates on Ancillary Business Activities of Lawyers and Law Firms (1990) (recommending that the ABA adopt a rule allowing, but regulating, ancillary businesses, summarized at 6 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 429); Dennis J. Block, Irwin H. Warren, & George F. Meierhofer, Jr., Model Rule of Professional Conduct 5.7: Its Origin and Interpretation, 5 GEO. J. LEGAL ETHICS 739 (1992) (defending the ABA's first version of Model Rule 5.7, adopted in 1991 and rescinded in 1992, that made ancillary businesses unethical). Other authorities are gathered in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT at 91:410-91:413 (1994). Predecessor Model Rule 5.7 was adopted by the ABA House of Delegates in 1991 and rescinded in 1992.

FN7. The lawyer who serves as a testifying expert is, however, subject to the Model Rules that govern lawyers generally, particularly Rule 8.4 ("Misconduct"). See, e.g., Attorney Grievance Commission of Maryland v. Breschi, 340 Md. 590, 667 A.2d 659 (1995) (willful failure to file income tax return on time justifies disbarment). Thus, for example, were the expert witness to testify falsely, discipline under Model Rule 8.4 would be warranted. See also ABA Formal Opinion 336 (1974).

FN8. A lawyer who is called upon to serve as a testifying expert in litigation in which information relating to the representation of a former client may be relevant is barred by Rule 1.9(c), infra n. 14, from using or

revealing information relating to the earlier client representation in the earlier matter that is not generally known, except as permitted under Rules 1.6 or 3.3. See also Rule 1.8(b). If the former client is the opposing party, the testifying expert is subject, not only to a disciplinary charge, but also to disqualification as an expert witness in the case. See, e.g., W.R. Grace & Co., et al. v. Gracecare, Inc., et al., 152 F.R.D. 61 (D.Md.1993) (lawyer patent expert for defendant disqualified because of earlier consultation with plaintiff's counsel in the same case, intending to retain the lawyer to advise on patent law as well as a possible rebuttal expert). Compare cases cited infra n. 9 involving efforts to disqualify non-lawyer experts.

FN9. The Committee believes that most courts would find that the lawyer testifying expert is a subagent of the party on whose behalf he is engaged to testify. See supra n. 2. Courts, in cases seeking to disqualify expert witnesses from testifying for an opponent, have either held or assumed that a nonlawyer testifying expert (or a nonlawyer expert consultant) occupies a confidential relationship to the party on whose behalf the expert originally was engaged that is limited to the matters on which he was engaged as an expert. See, e.g., Conforti & Eisele, Inc. v. Div. of Building Constr., 405 A.2d 487 (N.J.Super.Ct.Law Div.1979) (nonlawyer expert disqualified as witness for plaintiff when defendant had used the expert to advise it earlier in the same litigation, reasoning that the expert may have been the agent of defendant's counsel and his testimony therefore might violate the lawyer-client privilege, that defendant's counsel was upholding its obligations to preserve client confidences under DR 4-101 of the predecessor Code of Professional Responsibility, and that plaintiff's use of the expert "would be fundamentally unfair"); Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271 (S.D. Ohio 1988) (plaintiff's nonlawyer expert not disqualified from testifying that the cause of injuries was defective design of defendant's baseball helmet on which the expert previously had advised defendant, rejecting the presumption of disclosed confidences under the lawyer rules and finding that defendant failed to prove any discussion about plaintiff's injury occurred between the expert and the defendant); Great Lakes Dredge & Dock Co. v. Harnischfeger Corp., 734 F.Supp. 334 (N.D.Ill.1990) (nonlawyer expert for defendant not disqualified where he worked closely with plaintiff's expert at the same research center, rejecting as in the Paul case use of an analogy to the predecessor Code of Professional Responsibility and refusing to apply vicarious disqualification as if the two experts were lawyers in the same law firm).

FN10. Model Rule 1.7(b) states:
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

FN11. Rule 3.7(b) states:
(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.
See also State Bar of Mich., Comm. on Professional and Judicial Ethics Opinion RI-21 (1989) (firm barred from representing defendant when newly arrived "of counsel" to the firm previously had provided an expert opinion on plaintiff's behalf and would be called as a witness in the litigation).

FN12. Model Rule 1.10(a) states:
(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

FN13. Model Rule 1.9(a) states:
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

FN14. Model Rule 1.9(c) states:
(c) A lawyer who has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6

or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

FN15. The testifying expert's duties of confidentiality continue after the relationship with the party terminates. See supra nn. 2 and 12.

ABA Formal Op. 97-407

END OF DOCUMENT

EXHIBIT B

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-772, Sub 8
Docket No. P-913, Sub 5
Docket No. P-989, Sub 3
Docket No. P-824, Sub 6
Docket No. P-1202, Sub 4

In the Matter of)
)
Joint Petition NewSouth)
Communications Corp., et al. for)
Arbitration with BellSouth)
Telecommunications, Inc.)

Raleigh, North Carolina
Tuesday, December 14, 2004

Volume I

Deposition of HAMILTON RUSSELL,

a witness herein, called for examination by counsel for the Joint Petitioners, in the above-entitled action, pursuant to Notice, the witness being duly sworn by Sarah K. Mills, Court Reporter and Notary Public in and for the State of North Carolina, taken at the Offices of Parker Poe Adams & Bernstein, 150 Fayetteville Street Mall, Suite 1400, Raleigh, North Carolina, beginning at 2:30 p.m., on Tuesday, December 14, 2004, such proceedings being taken stenographically by Sarah K. Mills.

11b08afc-4660-4c8f-996d-e9d29ceb43ca

APPEARANCES OF COUNSEL

On behalf of the Joint Petitioners:
Henry C. Campen, Jr.
Parker Poe Adams & Bernstein, LLP
1400 Wachovia Capitol Center
Raleigh, NC 27602-0389

John J. Heitmann
Garret R. Hargrave
Kelley Drye & Warren
1200 19th Street, NW
Suite 500
Washington, DC 20036

On behalf of BellSouth:

Jim Meza
Robert A. Culpepper
BellSouth Legal Department
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375

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STIPULATIONS

Before testimony was taken, it was stipulated by and between counsel representing the respective parties as follows:

1. That any defect in the notice of the taking of this deposition, either as to time or place, or otherwise as required by statute is expressly waived, and this deposition shall have the same effect as if formal notice in all respects as required by statute had been given and served upon the counsel in the manner prescribed by law.

2. That this deposition shall be taken for the purpose of discovery or for use as evidence in the above-entitled action, or for both purposes.

3. That this deposition is deemed opened and all formalities and requirements with respect to the opening of the same, expressly including notice of the opening of this deposition, are hereby waived, and this deposition shall have the same effect as if all formalities in respect to the opening of the same had been complied with in detail.

4. That the undersigned, Sarah K. Mills, a Notary Public is duly qualified and constituted to take this deposition.

5. Objections to questions, except as to the form thereof, and motions to strike answers need not be made during the taking of the deposition, but may be reserved until any pretrial hearing held before any judge of any court of competent jurisdiction for the purpose of ruling thereon, or at any other hearing or trial of said case at which said deposition might be used, except that an objection as to the form of a question must be made at the time such a question is asked or objection is waived as to the form of the question.

6. That the North Carolina Rules of Civil Procedure shall control concerning the use of the deposition in court.

PROCEEDINGS

* * * * *

Whereupon,
HAMILTON RUSSELL,
having been duly sworn, testified as follows:

EXAMINATION

BY MR. MEZA:

Q. Good afternoon, Mr. Russell. My name is Jim Meza. I'm a lawyer for BellSouth. We're here to depose you in the context of an arbitration proceeding that our various companies have between each other. Have you been deposed before?

A. Yes.

Q. And I understand you're a lawyer?

A. Yes.

Q. So is it fair to assume that I don't need to instruct you on how a deposition should proceed?

A. That's fine.

Q. What's your current job title, sir?

A. Current job title is Vice President of Regulatory Affairs for NuVox Communications, Inc.

Q. In your duties do you provide counsel

Page 6

to NuVox?
A. Yes.
Q. So do you consider yourself a lawyer for NuVox?
A. Yes.
Q. Are you appearing as a lawyer today?
A. Appearing as a witness. I am also a lawyer by trade.
Q. As a witness, are you -- do you consider yourself a policy witness?
A. The testimony that I'm providing involves policy issues; however, my primary position with the company isn't -- is to assist with policy issues; however, that's not my everyday job role.
Q. Do you believe a policy witness should have facts to support their testimony?
A. In some instances, yes, but in others to testify based on their experience and as it would apply to issues of policy.
Q. Now, as -- I think you said director or vice president of regulatory; is that right?
A. That's right.
Q. Do you have specific segments of the business that you're responsible for?

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A. Yes.
Q. What are they?
A. I handle company corporate issues, contracts, some state regulatory work. Work with certain RBOCs, including BellSouth, among other things.
Q. What is a company corporate issue?
A. Setting up a company option plan.
Q. Okay, so HR?
A. Working on corporate development. Option plan is not necessarily HR. It's more of a benefits issue.
Q. Do you have any role in the formulation or revision of NuVox's tariffs?
A. To some degree, yes.
Q. And what degree is that?
A. The lady who actually files NuVox's tariff changes is a paralegal by the name of Mary Campbell. She works for me.
Q. Do you approve all the changes that she submits on behalf of NuVox?
A. I approve certain changes from time to time, as do others.
Q. Is there a particular type of change that would fall under your expertise?

Page 8

A. Not necessarily.
Q. Are there other people at NuVox who would approve a revision to a NuVox tariff related to the potential exposure NuVox may have in providing service to a customer?
A. Yes.
Q. Who is that?
A. Ed Caduke.
Q. What is his position?
A. He is Vice President of Regulatory Affairs.
Q. Is he also a lawyer?
A. Yes.
Q. Are you here today speaking on behalf of NewSouth and NuVox?
A. Yes.
Q. So everything -- well, just make sure we're clear. If I refer to one company and not the other, I'm using them interchangeably.
A. That's fine.
Q. Do you have any expertise in network issues?
A. In terms of learning the business over the past seven years, I'm familiar with network issues. I would not say that I'm an expert with

Page 9

regard to network issues.
Q. What about UNE costs?
A. I have been involved in UNE cost proceedings, and I've looked at prices as established by state commissions in terms of reviewing our network costs.
Q. Have you ever -- sorry.
A. I don't necessarily know if I am an expert in that regard, but I have reviewed network costs from time to time.
Q. Have you ever reviewed a cost study?
A. Yes.
Q. Have you ever performed a cost study?
A. In what --
Q. A TELRIC cost study?
A. What do you mean by performed a TELRIC cost study?
Q. Have you ever analyzed a cost study submitted by BellSouth for establishment of a UNE cost?
A. I have looked at cost studies from time to time that BellSouth has submitted to a state commission.
Q. Did you review the methodology used by BellSouth to come to the derived cost in the

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Marcellous Primus, Plaintiff, vs. BellSouth Advertising & Publishing Corporation, formerly BellSouth Corporation, Defendant.	Civil Action No. 3:05CV105-K **MOTION FOR EXTENSION OF TIME** Rule 6(b), Fed. R. Civ. P.

Defendant BellSouth Advertising & Publishing Corporation ("BAPCO"), by and through undersigned counsel, respectfully moves pursuant to Fed. R. Civ. P. 6(b) for an extension of time within which it may answer or otherwise respond to the Complaint filed in this action. In support of this motion, BAPCO respectfully shows the following:

1. A copy of the Complaint was served on BAPCO's registered agent for service of process on May 20, 2005, and thus, BAPCO's time to answer or otherwise respond to the Complaint expires on June 9, 2005.

2. Counsel for BAPCO was not retained until the afternoon of June 7, 2005, and counsel received a copy of the Complaint on this same date.

3. Counsel for BAPCO has not had the opportunity to discuss with the client the allegations set forth in the Complaint or fully research applicable defenses.

4. Counsel for BAPCO has attempted to contact Plaintiff's counsel directly to seek an extension of time, but has been unable to reach him.

5. In light of the foregoing, BAPCO respectfully submits that good cause exists to grant this motion and extend BAPCO's time to answer or otherwise respond to the Complaint.

WHEREFORE, Defendant respectfully prays that Defendant BAPCO be given to and including June 29, 2005 within which to serve an answer or other responsive pleading to the Complaint in this action.

Dated: Charlotte, North Carolina
June 9, 2005

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: _____

Jim O. Stuckey, II
N.C. State Bar No. 20153
Paul J. Osowski
N.C. State Bar No. 23423
Bank of America Corporate Center
Suite 2400, 100 North Tryon Street
Charlotte, NC 28202-4000
Phone: (704) 417-3000
Fax: (704) 377-4814
Attorneys for Defendant BellSouth Advertising & Publishing Corporation

CERTIFICATE OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough, L.L.P., attorneys for BellSouth Advertising & Publishing Corporation, do hereby certify that I have served all counsel in this action with a copy of the foregoing pleading(s) by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Donald Gist, Esq.
Gist Law Firm
4400 North Main Street
Columbia, SC 29203

James E. Smith, Jr., Esq.
Smith Ellis & Stuckey, PA
1422 Laurel Street
Columbia, SC 29201

This the 9 day of June, 2005.

Paul J. Osowski

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Marcellous Primus,	)	Civil Action No. 3:05CV105-K
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
BellSouth Advertising & Publishing Corporation, formerly BellSouth Corporation,	)	
	)	
Defendant.	)	

This matter is before the Court upon motion of Defendant BellSouth Advertising & Publishing Corporation, pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, for an order extending the time within which said Defendant may answer or otherwise respond to the Complaint filed by Plaintiff in this action to and including June 29, 2005.

For cause shown, it is ORDERED, ADJUDGED, AND DECREED that the time within which the Defendant may answer or otherwise respond to the Complaint is hereby extended to and including June 29, 2005.

This the ____ day of June, 2005.

The Honorable David C. Keesler
United States Magistrate Judge

Nelson
Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, South Carolina 29201
Tel: 803.799.2000 Fax: 803.256.7500
www.nelsonmullins.com

Kevin A. Hall
803.255.9522
Fax: 803.255.9030
kevin.hall@nelsonmullins.com

January 19, 2005

VIA HAND DELIVERY

The Honorable Beth Carrigg
Clerk of Court
Lexington County
205 E. Main Street, Suite 146
Lexington, SC 29072

RE: Mid-Carolina Electric Cooperative, Inc. v.
BellSouth Telecommunications, Inc.
Civil Action No. 2004-CP-32-4506
Our File No. 550/1615

Dear Ms. Carrigg:

Enclosed please find an original and one copy of the Answer and Counterclaims of Defendant BellSouth Telecommunications, Inc. Please file the original and return a file stamped copy to us via our courier.

By copy of this letter, we are hereby serving a copy of this pleading on opposing counsel.

Sincerely yours,

Kevin A. Hall

KAH:dj
Enclosures

cc: Marcus A. Manos, Esquire

LAW OFFICES
NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.
A REGISTERED LIMITED LIABILITY PARTNERSHIP

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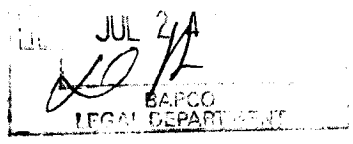
CHARLOTTE, NORTH CAROLINA
GREENVILLE, SOUTH CAROLINA
MYRTLE BEACH, SOUTH CAROLINA
MUNICH, GERMANY

July 21, 2000

VIA HAND DELIVERY
The Honorable Mel Maurer
Magistrate's Court
Dutch Fork District
1223 St. Andrews Road
Columbia, SC 29210



RE: C. Ray Frady, Individually, and d/b/a C. Ray Frady, CPA v. Bell South Advertising and Publishing Corporation
Civil Action No. 99-4632997
Our File No. 01199/1546

Dear Judge Maurer:

Enclosed are the original and one copy of Defendant's Motion for Summary Judgment, Memorandum in Support of Defendant's Motion for Summary Judgment and Affidavit in the above-referenced matter. We would appreciate it if you would file the original documents and return clocked in copies to us via our courier.

By copy of this letter to plaintiff's counsel, we are hereby serving him with copies of these documents.

Very truly yours,

Howard A. VanDine, III

HAVIII:dch
Enclosures
cc: David E. Taylor, Esquire (via Hand Delivery)
bcc: Derry Harper, Esquire

EXHIBIT D

LAW OFFICES
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Professional Association
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601-968-5500

Robert P. Wise

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EMail: RPW@wisecarter.com
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June 14, 2005

Mr. Marc E. Brand w/encl. (via email and hand delivery)
1150 Capital Towers
Jackson, Mississippi 39207-3508

Mr. Sam Nicholas w/encl. (via email and hand delivery)
138 E. Amite Street
Jackson, MS 39201

Mr. Keith Howle (via hand delivery)
5339 Saratoga Drive
Jackson, MS 39211-4112

Re: Docket 2004-AD-094; NewSouth *et al.* Joint Petition for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended.

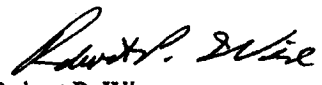
Gentlemen:

Please accept this letter as notice that James Falvey (Xspedius) and Jerry Willis (NuVox/NewSouth) will appear as Joint Petitioners' witnesses during the hearing scheduled for June 15, 2005. Mr. Falvey and Mr. Willis will serve as the witnesses for all remaining open issues for their respective companies. In addition to sponsoring his own pre-filed testimony, Mr. Willis will adopt the pre-filed testimony of Mr. Hamilton Russell, who was previously designated NuVox/NewSouth's witness for issues 2, 4, 5, 6, 7, 9, 12, 26, 36, 51, 86, 97, 100, 101, 102, 103 and 104. KMC has withdrawn from this arbitration and therefore will not have a witness present at the hearing.

Joint Petitioners and BellSouth have recently engaged in similar arbitration hearings before eight state public service commissions. Where a witness panel was not used, the Joint Petitioners jointly designated one "lead witness" to take the stand per issue. In light of the Panel's decision that a witness panel will not be used, please be advised that Mr. Falvey will serve during the hearing as the lead witness on Issues 2, 4, 5, 6, 7, 9, 12, 26, 36, 51, 65, 86, 88, 97, 100, 101, 102, 103, and 104. Mr. Willis will serve as lead witness on Issues 37 and 38.

A copy of this letter has been delivered to BellSouth's counsel of record for this proceeding.

Very truly yours,



Robert P. Wise
Counsel to Joint Petitioners

RPW
Cc: John Heitmann, Esq.

Mr. Thomas B. Alexander w/Encl. (via email and hand delivery)
BellSouth Telecommunications, Inc.
Room 790, Landmark Center
175 E. Capitol Street
Jackson, Mississippi 39201

Mr. Brian U. Ray (via hand delivery)
Executive Secretary
Mississippi Public Service Commission
501 North West Street, P.O. Box 1174
Woolfolk Building
Jackson, MS 39215

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth's Memorandum in Reply to Joint Petitioners' Response to BellSouth's Motion to Strike in Docket No. 2005-57-C to be served upon the following this June 27, 2005:

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211
(U. S. Mail and Electronic Mail)

Daphne Duke
Administrative Assistant
Public Service Commission of South Carolina
Post Office Drawer 11649
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Florence P. Belser, Esquire
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Office of Regulatory Staff
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(U. S. Mail and Electronic Mail)

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Ellis Lawhorne & Sims, P.A.
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(NewSouth, NuVox, KMC, Xspedius)
(U. S. Mail and Electronic Mail)

John J. Heitmann
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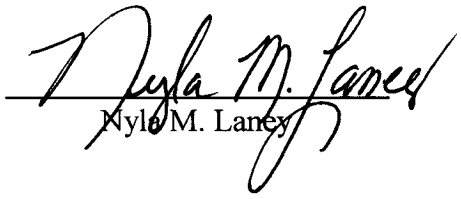

Nyla M. Laney

PC Docs # 591218